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| EXAMINER |
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TECCO, ANDREW M

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PAPER

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/598,074  
Filing Date: August 17, 2006  
Appellant(s): OGG ET AL.

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Michael Marcin  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed 23 June 2009 appealing from the Office action mailed 20 April 2009.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

No evidence is relied upon by the examiner in the rejection of the claims under appeal.

### **(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-2, 4-8, 10-14, and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over McHugh (US Patent 6,230,047) in view of Huish et al. (US Patent 5,879,270) hereinafter referred to as Huish.

McHugh discloses all of applicant's claimed invention with the exception of alternating the rendering of the first and second audio signals according to (4) and (5) of claim 1.

Huish teaches an exercising device with a sensing unit **(26)** that encourages a change in the heartbeat of the user to achieve certain parameters, wherein the processing unit **(25, 35)** alternates the rendering of the first and second encouragement stimulus **(Abstract - raising and lowering elevation of treadmill)** according to: rendering the first encouragement stimulus to the user at least until the processor determines the parameter has achieved the first parameter value, and rendering the second encouragement stimulus to the user at least until the processor determines the parameter has achieved the second parameter value **(figs. 5A and 5B)**.

Given the teachings of Huish, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the processor of the first and second audio signal training device of McHugh with the alternating stimulus function of the training processor of Huish. Doing so would enable the user to easily alternate between raising and lowering their heart rate and provide for a more effective workout as interval training is a well known type of exercise regimen.

Claim 3 is rejected under 35 U.S.C. 103(a) as being unpatentable over McHugh (US Patent 6,230,047) in view of Huish et al. (US Patent 5,879,270) hereinafter referred to as Huish in view of Stubbs et al. (US Patent 6,736,759) hereinafter referred to as Stubbs.

Stubbs teaches using a time-interval of the device usage as a parameter for alerting the user to perform at a greater or lesser amount of intensity (**col. 24 lines 30-41**).

Given the teachings of Stubbs, it would have been obvious to one of ordinary skill in the art at the time the invention was made to incorporate the “period of time” interval training feature of Stubbs with the heart rate interval training of McHugh in view of Huish. Doing so would allow the user to train to run for particular patterns of time.

Claim 9, 15, and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over McHugh (US Patent 6,230,047) in view of Huish et al. (US Patent 5,879,270) hereinafter referred to as Huish in view of Curtin (US Patent 5,986,200).

Curtin teaches an audio device that has audio signals with annotated beat per minute values (**col. 3 lines 51-58; fig. 2 #45; col. 5 lines 30-45**) and a method by which a first set of audio signals are swapped out by the personal training device for a different but similar set of audio signals (**verse shuffle mode - col. 4 lines 20-35**). Furthermore, Curtin teaches the use of a track shuffle (**49**) which would further render similar but different audio signals at predetermined periods of time.

Given the teachings of Curtain, it would have been obvious to one of ordinary skill in the art at the time the invention was made to incorporate the annotated beat per minute value of Curtain with the audio signals of McHugh. Doing so would enable the user to better know the rate at which they were exercising. Furthermore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the beat and rhythm audio signals of McHugh in view of Huish with the additional audio signals, music, and verse shuffle mode of Curtain. Doing so would provide considerably more user listening options than a required fixed length playback generally associated with conventional playback devices.

#### **(10) Response to Argument**

##### **Response to Appellant's Argument Under Heading I–B:**

The appellant asserts that McHugh and Huish do not disclose or suggest a memory to store a plurality of audio signals each having a predetermined tempo value. To support this the appellant points to McHugh col. 5 lines 41-44 and argues that the variable tempo value is not a "predetermined tempo value". However, the examiner has pointed to memory (32 – memory, col. 4 line 67) that is used to store a plurality of audio signals (col. 4 line 65 – col. 5 line 5, "plurality of rhythm pattern data"). As broadly interpreted by the examiner, a "plurality of rhythm pattern data" reads on "a plurality of audio signals, each having a predetermined tempo value, as the rhythm pattern data would inherently have a tempo.

Furthermore, the examiner points to a different embodiment ("Another aspect of the present invention") col. 5 line 61 – col. 6 line 6 which specifically speaks to "A programmed rhythm is played at a desired, e.g. normal, heartbeat. The programmed rhythm is played at least as long as the user's heartbeat is above the desired heartbeat." and "A programmed rhythm is played at a desired, or preprogrammed level..." This does not speak to the "variable tempo value" to which the appellant speaks.

Appellant argues that McHugh fails to disclose the selection of first and second audio signals having a respective tempo corresponding to the first and second target parameter values. The examiner contends that the selection of a first audio signal is disclosed by col. 5 lines 61-67 ('programmed rhythm') and the selection of a second audio signal is disclosed by col. 6 lines 1-6 ('programmed rhythm is played at a level above the person's resting heartbeat')

#### **Response to Appellant's Arguments Under Heading I-C:**

Appellant argues that McHugh and Huish do not disclose or suggest selecting a first and second audio signal having a respective tempo corresponding to the first and second target parameter values. Appellant cites that McHugh generates the rhythm pattern with a tempo corresponding to the user's heart rate, and that McHugh does not select a rhythm pattern having a predetermined tempo, but rather takes the user input of the rhythm pattern selection and generates that rhythm pattern at any tempo.

However, the examiner points to a different embodiment ("Another aspect of the present invention") col. 5 line 61 – col. 6 line 6 which specifically speaks to "A programmed rhythm is played at a desired, e.g. normal, heartbeat. The programmed rhythm is played at least as long as the user's heartbeat is above the desired heartbeat." and "A programmed rhythm is played at a desired, or preprogrammed level, to permit the user to exercise at that level" This speaks to a first and second audio signal having a respective tempo corresponding to the first and second target parameter values and do not speak to the "variable tempo value" to which the appellant speaks.

The teachings of Huish further an exercising device with a sensing unit **(26)** that encourages a change in the heartbeat of the user to achieve certain parameters, wherein the processing unit **(25, 35)** alternates the rendering of the first and second encouragement stimulus **(Abstract - raising and lowering elevation of treadmill)** according to: rendering the first encouragement stimulus to the user at least until the processor determines the parameter has achieved the first parameter value, and rendering the second encouragement stimulus to the user at least until the processor determines the parameter has achieved the second parameter value **(figs. 5A and 5B)**.

Given the teachings of Huish, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the processor of the first and second audio signal training device of McHugh with the alternating stimulus function of the training processor of Huish. Doing so would enable the user to easily alternate

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between raising and lowering their heart rate and provide for a more effective workout as interval training is a well known type of exercise regimen.

Appellant argues that claim 12 is allowable for the same reasons as claim 1, and thus claims 13-14, and 17 are allowable. The examiner contends that the rejection of claim 12 is valid for the same reasons the rejection of claim 1 is valid as stated above, and thus the rejections of claims 13-14, and 17 are valid.

**Response to Appellant's Arguments Under Heading II-B:**

The Appellant has argued that Stubbs has not cured deficiencies of McHugh and Huish as described above in claim 1 and because claim 3 depends from claim 1 it should be allowed. The examiner contends that for the reasons stated above that the rejection of claim 1 is valid and therefore contends that the rejection of claim 3 is valid.

**Response to Appellant's Arguments Under Heading III-B:**

The Appellant has argued that Stubbs has not cured deficiencies of McHugh and Huish as described above in claim 1 and 12 and because claim 9 depends from claim 1, and claims 15 and 16 depend from claim 12 they should be allowed. The examiner contends that for the reasons stated above that the rejection of claims 1 and 12 is valid and therefore contends that the rejection of claims 9, 15, and 16 are valid.

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**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Andrew M Tecco/

Examiner, Art Unit 3764

9 September 2009

/LoAn H. Thanh/

Supervisory Patent Examiner, Art Unit 3764

Conferees:

/LoAn H. Thanh/

Supervisory Patent Examiner, Art Unit 3764

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Supervisory Patent Examiner, Art Unit 3762